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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 558

THE ATLANTIC REFINING COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No.

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FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on April 12, 1965.

CITATION TO OPINION BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a-15a)[1] is reported at 344 F. 2d 599.

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[1] Herein, "App." refers to the appendix printed *infra,* and "R." to the joint appendix certified by the court of appeals below.

JURISDICTION

The judgment of the court of appeals (App. A, *infra,* p. 15a) was entered on April 12, 1965; the court entered its final decree on May 3, 1965 (App. A, *infra,* p. 16a). The court of appeals extended the time for filing a petition for rehearing by order entered on April 28, 1965 (App. A, *infra,* p. 17a), and denied the petition for rehearing by order entered on June 14, 1965 (App. A, *infra,* p. 18a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether this Court in *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964), overruled *United States* v. *General Electric Co.,* 272 U.S. 476 (1926), insofar as the retail marketing of gasoline is concerned.

(2) Whether the temporary employment by an oil company of bona fide consignment agreements with retail gasoline dealers for the purpose of assisting such dealers in price war situations, in the absence of use of coercive acts to obtain acceptance of such agreements, violates Section 5 of the Federal Trade Commission Act and is controlled by this Court's holding in *Simpson* v. *Union Oil Co., supra.*

(3) Whether, since petitioner employed consignment contracts in reliance upon their legality under *General Electric,* the court of appeals erred in refusing to consider whether equities warrant only prospective application of its interpretation of the *Simpson* holding in determining petitioner's liability.

(4) Whether an opinion and order concurred in by only two of the five Federal Trade Commission members is valid and enforceable.

STATUTE INVOLVED

The statutory provision involved is Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which, in pertinent part, provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

This petition seeks review of the judgment of the Court of Appeals for the Sixth Circuit which affirmed an order of the Federal Trade Commission directing petitioner to cease and desist from violating Section 5 of the Federal Trade Commission Act.

Petitioner is engaged in the production, sale, and distribution of gasoline and other petroleum products in a seventeen state area. Retail gasoline price wars occur from time to time in petitioner's marketing area. Price war conditions are frequently such that petitioner's dealers cannot continue to buy gasoline at normal tank wagon prices and resell to consumers at prices competitive with other dealers of other suppliers without experiencing financial losses and probable extinction. Consequently, beginning in February of 1956, petitioner adopted a policy whereby, when price war conditions resulted in its dealers being unable to obtain a "living" margin (at least 4¢ per gallon), the dealers in such price war areas were offered assistance in the form of consignment contracts under which the dealer was guaranteed a minimum commission on each gallon of gasoline sold. This particular method of dealer assistance was adopted to avoid the pitfalls of the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. § 13(a).

In adopting this defensive consignment program, petitioner relied upon *United States* v. *General Electric Co.*, 272 U.S. 476 (1926).

On April 13, 1958, the commission issued a complaint (R. 1a-14a), charging in three counts that petitioner had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by fixing and maintaining resale prices of gasoline in connection with a retail price war which occurred on the Delmarva Peninsula[2] in 1957.

Counts I and II of the complaint charged that petitioner coerced and pressured its retail service station dealers to accept consignment contracts. Count II charged that such consignment contracts were "nothing more than shams and subterfuges" for the fixing of retail gasoline prices. Count III, dealing with petitioner's relations with its wholesale gasoline distributors, charged a conspiracy between petitioner and its distributors in the Delmarva Peninsula to fix the prices at which gasoline was sold at the wholesale level, as well as at retail in the gasoline service stations owned and operated or sold to by said distributors.

After administrative hearings, a hearing examiner filed an initial decision (R. 24a-60a) in which he dismissed Counts I and II, finding that petitioner's consignment agreements created bona fide agency relationships, that petitioner retained title to gasoline in its agents' tanks, and that petitioner therefore had a legal right to control the prices at which its own

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[2] The Delmarva Peninsula comprises portions of the states of Delaware, Maryland and Virginia.

merchandise was sold to the consuming public.[3] The examiner relied on *United States* v. *General Electric Co., supra.* He held "that the respondent [petitioner] has utilized a legal method of procedure in meeting the competitive situation with which it was confronted in July, 1957 in the 'Delmarva Peninsula' in protecting its dealers from the price war that was prevalent in that area" (R. 54a). He further found that petitioner had not coerced its dealers into entering consignment contracts (R. 55a).

After hearing before the commission on cross appeals, an "Opinion of the Commission" (R. 66a-83a), written by Commissioner MacIntyre, was issued on May 16, 1963. This opinion noted that Commissioner Elman did "not concur" and that Commissioners Anderson and Higginbotham did not participate (R. 83a).[4] In this opinion, Commissioner MacIntyre (with the concurrence of only one other commissioner) reversed the hearing examiner's dismissal of Counts I and II, finding that petitioner's consignment contracts with its retail dealers violated Section 5 of the Federal Trade Commission Act.

While holding that "[d]oubtless the respondent [petitioner] felt that it had devised a consignment program valid in that it met all of the criteria of consignment as prescribed in the law of agency . . ."

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[3] As to Count III, the examiner found a violation and entered a tentative order. This finding was subsequently affirmed by the opinion of the commission.

[4] On June 10, 1963, petitioner moved for a "rehearing before the full Commission, sitting *en banc* . . ." on the ground that the opinion and order were issued by only two members of the five-member commission (R. 87a). The motion for rehearing was denied by order entered June 28, 1963 (R. 88a-89a).

(R. 79a), Commissioner MacIntyre distinguished the 1926 *General Electric* decision, ruling that petitioner "... attempted to make its dealers genuine agents, but the change made was merely of form and not of substance ..." (R. 78a), and that, since petitioner's program was "only used at irregular intervals and in certain markets during price wars," it was a "temporary" program as contrasted with General Electric's "permanently implemented and universally applied" system (R. 77a-78a). Although the opinion agreed that petitioner had not forced its dealers to enter consignment contracts, the two commissioners further held that petitioner was liable because price war conditions, which petitioner admittedly did not create, had made it advantageous for dealers to enter into the contracts. The opinion stated: "To the extent that the lessee-dealers had no alternative but economic death to entering a consignment-agreement with respondent [petitioner], it must be found that they were pressured or coerced to enter such contracts and the hearing examiner's finding to the contrary is in error. *However, there does not appear to be any evidence in this record that the respondent [petitioner] used its position of economic power over its lessee dealers to force them into entering the contract*" (R. 69a-70a; emphasis added).

Before the court of appeals, petitioner contended that its consignment agreements made bona fide agents of its retail gasoline dealers; that the type of "coercion" found by the commission, *i.e.*, economic "coercion" by reason of business conditions which petitioner did not create and had no power to prevent, was not the type with which this Court was concerned in *Simpson* v. *Union Oil Co., supra;* and that the fact

that petitioner's consignment program was a temporary and defensive one, utilized only to assist dealers in limited price war areas and not to control prices, distinguished the case from *Simpson.*

The court of appeals agreed with petitioner that the consignment agreements made bona fide agents of its retail dealers but held that *Simpson,* which was decided after the commission's opinion and order were entered, "decided the major question" in that this Court "limited the protection of such agreements . . . to situations where the protected consignment agreements pertained to products on which the consignor held patent rights" (App. A, p. 1a).[5] In affirming the commission's order, the court of appeals uncritically adopted the commission's theory of "coercion" and held the fact that petitioner utilized the consignment agreements only to assist dealers in price war conditions offered no basis for distinguishing the case from *Simpson.*

With respect to petitioner's contention that, assuming *Simpson* is controlling, the court should, in equity and fairness, decline to apply the holding retroactively since petitioner relied upon the legality of consignment selling as declared in *United States* v. *General Electric Co., supra,* the court of appeals held:

> Since the relief contemplated by this order consists of cease and desist orders which can be applied only prospectively after determination of their validity, we see no need to grapple now

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[5] In this same vein, the court of appeals stated that its problems with the issues presented "would be considerable" but for the fact that this Court in *Simpson* had overruled *General Electric* insofar as non-patented products are concerned (App. A, p. 1a).

with the question as to whether *Simpson* v. *Union Oil Co., supra,* should be applied retroactively (App. A, p. 15a).

Finally, with respect to petitioner's contention that an order concurred in by only two members of the commission is not valid or enforceable, the court of appeals held:

> The rules of the Federal Trade Commission since its inception have provided for decision by the majority of panels of three members [footnote omitted]. We believe this rule is within the Commission's power to make and is wholly valid. *Drath* v. *Federal Trade Commission,* 239 F. 2d 452 (C.A.D.C., 1956), *cert. denied,* 353 U.S. 917 (1957) (App. A, p. 14a).

REASONS FOR GRANTING THE WRIT

I. BECAUSE OF THE MAGNITUDE OF THE IMPACT UPON THE NATION'S PRIVATE ECONOMY, THE VAST NUMBER OF BUSINESS RELATIONSHIPS AFFECTED, AND THE CURRENT CONFUSION PLAGUING BUSINESS AND THE BAR, THE QUESTION WHETHER THIS COURT HAS OVERRULED UNITED STATES v. GENERAL ELECTRIC CO. REQUIRES A DEFINITIVE ANSWER

This case presents four-square the question: Does *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964), overrule *United States* v. *General Electric Co.,* 272 U.S. 476 (1926)? This question requires an answer.

Consignment selling is and for many years has been a commonly used method of distribution in many industries.[6] Many consignment agreements now in effect

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[6] As noted by the dissenting Justices in *Simpson,* consignment arrangements are of widespread use throughout the nation's economy (377 U.S. at 30, 31). "Approximately one-sixth of the total volume of the nation's wholesale trade is carried on by independent brokers or agents who never acquire title to the goods they sell, and three and one-half per cent of such trade is accounted for by commission merchants or consignees." Handler, *Recent Antitrust*

were entered into in reliance on *General Electric, supra.* The legality of this method of distribution is of great importance to a substantial segment of the nation's private business. This case, therefore, presents a question of importance far transcending the particular facts and parties involved, and this petition, in a most realistic sense, seeks the determination of issues which will clarify the law for a substantial sector of the business community.

From the time of this Court's 1926 *General Electric* decision until 1964, there was no question as to the legality of consignment selling. By reason, however, of this Court's holding in *Simpson* in April 1964, substantial confusion now prevails. This confusion, primarily relating to the meaning of the *Simpson* holding, is being compounded and perpetuated by diverse court interpretations and by a myriad of interpretations by commentators.

In its opinion below, the court of appeals interpreted *Simpson* as declaring that any employment by a major gasoline company of consignment agreements with retail dealers is *per se* unlawful, regardless of the purpose of the program, and viewed *Simpson* as categorically limiting the protection granted such agreements by General Electric "to situations where . . . the consignor held patent rights" (App. A, p. 1a).

Faced with substantially parallel facts, the Seventh Circuit, in *Sun Oil Co.* v. *Federal Trade Commission,* No. 14503, 7th Cir., August 19, 1965 (printed as Ap-

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Developments, 63 Mich. L. Rev. 59, 61-62 (1964), citing Beckman, Engle & Buzzell, *Wholesaling* (3d ed. 1959); Phillips & Duncan, *Marketing-Principles and Methods,* (4th ed. 1960); Klaus, *Sale, Agency and Price Maintenance,* 28 Col. L. Rev. 312 (1928).

pendix B hereto, *infra,* pp. 19a-42a), interpreted *Simpson* differently. There, the court declined to interpret the holding as declaring consignment selling of nonpatented products *per se* illegal, and thought it the "best course" to "view *Simpson* limited by its own particular factual context, and to proceed case-by-case where consignment systems resulting in vertical price control are involved" (App. B, p. 38a). The special facts which the Seventh Circuit believed were significant in *Simpson* were those relating to the use of coercive tactics by Union Oil in obtaining acceptance of the consignment agreement by all of its retail gasoline dealers.

Adding to the perplexing confusion confronting business and the bar is the decision of the District Court for the Southern District of New York in *Lyons* v. *Westinghouse Electric Corp.,* 235 F. Supp. 526 (S.D.N.Y. 1964), where the court apparently believed that the controlling fact in finding Union Oil's consignment program unlawful was that it covered a "vast gasoline distribution system" (*Id.* at 535). If consignment selling is unlawful in this type of system, reasoned the court, "the same would seem to be true when the business is a vast system of distributing electric lamps" (*Id.* at 535-36).

In *CBS Business Equipment Corp.* v. *Underwood Corp.,* 240 F. Supp. 413 (S.D.N.Y. 1964), Judge Tenney, as did Judge McLean in *Lyons,* believed that in *Simpson* "the Supreme Court has given validity to the argument, rejected in GE, that 'the system of distribution is so complicated and involves such a very large number of agents, distributed throughout the entire country, that the very size and comprehensiveness of the scheme brings it within the Anti-Trust

Law' " (*Id.* at 424). He refused however to interpret *Simpson* as declaring consignment agreements *per se* unlawful, and, accordingly, denied a motion for summary judgment and ordered trial to determine, *inter alia,* whether the type of coercion found in *Simpson* was practiced by Underwood (*Id.* at 425-26).[7]

A realistic analysis of the pertinent judicial pronouncements on the issue of the legality of consignment selling as created by *Simpson* demonstrates, petitioner submits, that uniformity of interpretation and result will not be forthcoming until this Court instructs the business community and the bar as to the exact meaning of *Simpson,* and whether anything remains of the principles laid down in the 1926 *General Electric* case.

The record in the instant case will facilitate an informed and thorough analysis of the extent to which *General Electric* retains vitality. The record discloses in detail the underlying business and legal reasons prompting petitioner's utilization of consignment con-

[7] As is inevitable when an issue as sensitive and important as the legality of the consignment method of distribution is in question, numerous law review articles and comments have been written on the subject, again without apparent accord on the meaning of *Simpson.* See 6 B.C. Ind. & Com. L. Rev. 318 (1965); 14 De Paul L. Rev. 165 (1964); 17 Stan. L. Rev. 519 (1965); 16 Syr. L. Rev. 116 (1964); 43 Tex. L. Rev. 569 (1965); 2 Tulsa L. J. 55 (1965); 37 U. Colo. L. Rev. 293 (1965); 18 Vand. L. Rev. 222 (1964); 78 Harv. L. Rev. 143, 279 (1964); 63 Mich. L. Rev. 59 (1964). A review of these materials readily discloses the prevailing confusion. These differing interpretations, however, represent only the surface confusion. The practical and most perplexing confusion is to be found in the minds of businessmen and their legal advisors. Given the instruction now available, it is virtually impossible to chart a guide or the future or to advise a particular business that it may or may not continue or initiate a consignment method of distribution.

tracts, the competitive conditions under which such contracts were utilized, the results flowing therefrom and the attitude of and effect upon dealers. Thus, in accord with the suggestion of Mr. Justice Stewart in his dissenting opinion in *Simpson,* and of Justices Brennan and Goldberg in their separate memorandum, the instant case—compared to *Simpson* which was dismissed by the district court on a motion for summary judgment—offers an opportunity to consider legal issues of great "impact and magnitude"[8] on the basis of a full record, including a record on the question of whether the consignment involved is a "coercive type of 'consignment' agreement."[9] This case will also afford the Antitrust Division of the Department of Justice an opportunity to express its views.

II. THE COURT BELOW INCORRECTLY INTERPRETED SIMPSON IN APPLYING IT TO THE FACTS IN THE INSTANT CASE AND IN SO DOING REACHED A CONCLUSION IN CONFLICT WITH THAT OF THE SEVENTH CIRCUIT

A. On the Facts of This Case, the Court of Appeals Erred in Holding That Simpson v. Union Oil Co. Is Controlling

The basic question presented by this case is whether petitioner may assume the burdens of marketing directly to the consumer during price wars by means of consignment selling in order to preserve its dealers against severe financial loss and possible extinction and yet avoid liability under the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. § 13(a).

The court below viewed *Simpson* as placing a blanket prohibition on the "employment by a major gasoline company of consignment agreements with gas station

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[8] 377 U.S. at 29.

[9] *Id.* at 32.

owners" and limiting "the protection of such agreements . . . to situations where the protected consignment agreements pertained to products on which the consignor held patent rights" (App. A, p. 1a). The court of appeals dismissed petitioner's argument that the facts of the instant case regarding the purpose and function of its program and the absence of coercive acts distinguishes it from *Simpson* as "seeking to restore vitality to *United States* v. *General Electric Co., supra*" (App. A, p. 9a). "As such," said the court of appeals, "this argument must plainly be addressed not to this court, but to the United States Supreme Court in an argument which seeks the overruling of *Simpson* v. *Union Oil Co., supra*" (*Ibid.*).

Petitioner submits that the court of appeals erred in finding no distinction between *Simpson* and this case; there are two major distinctions. The first lies in the undisputed fact that petitioner initiated and utilized its consignment program for the express purpose of avoiding price discrimination liability under the Robinson-Patman Act in assisting its dealers in price war conditions. Because of the increasingly complex questions involved in granting dealer assistance in price war situations posed by that Act,[10] petitioner sought a legal method by which it could grant effective assistance to its dealers. Relying upon the judicial sanction of bona fide consignment contracts found in

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[10] Under the Robinson-Patman Act, the Federal Trade Commission has challenged virtually every system employed by oil companies to provide assistance to dealers. See *The Texas Company*, FTC Docket 6898; *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505 (1963); *Pure Oil Co.*, FTC Docket 6640; *American Oil Co.* v. *Federal Trade Commission*, 325 F. 2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Humble Oil and Refining Co.*, FTC Docket 8544; *Shell Oil Co.*, FTC Docket 8537.

General Electric, and the fact that the use of consignment contracts with gasoline dealers had been expressly suggested by this Court as a legitimate method of doing business in *Standard Oil Co.* v. *United States,* 337 U.S. 293, 310 (1949), petitioner initiated its consignment program.

In application, petitioner's program complied strictly with the purpose of its initiation. The findings of the hearing examiner, the commission, and the court of appeals leave no doubt in this regard. The hearing examiner found: "So far as the record is concerned, it is clear that in all instances the respondent [petitioner] offered to help the dealer meet an impossible competitive situation" (R. 55a). The commission's finding, adopted by the court of appeals, was that petitioner's policy was to offer its dealers assistance in the form of a consignment contract "[w]hen price war conditions prevail in a given competitive trade area so that the spread between the dealer [tank wagon] price of Atlantic gasoline and the prevailing service station price at comparable service stations is less than 4¢ per gallon . . ." (App. A, p. 4a; R. 69a). Petitioner constantly surveyed markets and only when it ascertained that general market prices were so deteriorated because of price war conditions that its dealers could not survive without aid did it offer to enter into consignment contracts (R. 40a-41a).

Thus, while this Court in *Simpson* could find no reason for the adoption of the consignment method of distribution by Union Oil, aside from resale price maintenance, it is clear that the function and purpose of petitioner's consignment program was not to maintain or control retail prices but to provide what petitioner believed was a legal method of assisting its

dealers in remaining viable competitors while avoiding liability under the Robinson-Patman Act.

The court of appeals rejected petitioner's argument that the fact petitioner restricted the employment of its consignment agreement to price war situations distinguishes the case from *Simpson,* believing instead that the "fact that it applied its consignment agreement only to price wars simply underlines the fact that this was indeed, as found by the Commission, a price fixing mechanism" (App. A, p. 14a). The court of appeals erred in so holding. Not only does the limitation to price war situations in petitioner's program distinguish this case from *Simpson* but it conclusively demonstrates that petitioner's purpose was to assist dealers by making it possible for them to sell at reduced prices to meet competition rather than to maintain resale prices. This is the very antithesis of the *Simpson* case. Indeed, the litigation there arose because Union Oil refused to permit Simpson to reduce his prices to meet competition. Simpson insisted, reduced his prices, and Union Oil refused to renew his lease because he did so.

The second major distinction between the instant case and *Simpson* lies in the issue of "coercion." The court below found it "clear that Union Oil applied its system coercively to Simpson because they refused to renew a lease to him solely because he sold gasoline below their fixed price" (App. A, p. 12a). In obvious contradiction the court then adopted the commission's finding that petitioner's program "as planned and implemented, did not entail forcing dealers, including lessee-dealers, operating on company-owned premises, to execute the consignment agreements . . ." and that "there does not appear to be any evidence in this record

that the respondent [petitioner] used its position of economic power over its lessee dealers to force them into entering the contract" (App. A, pp. 13a, 14a). However, the court of appeals believed that the essential coercive element existed by virtue of the fact that "business conditions" (price wars), which petitioner admittedly did not create and had no power to prevent, made it advantageous for dealers to enter into the consignment arrangements. The court below thus adopted the following reasoning of the commission:

> Any dealer faced with a price-war situation was offered the consignment program or nothing . . . . To the extent that the lessee-dealers had no alternative but economic death to entering a consignment agreement with respondent, it must be found that they were pressured or coerced to enter such contracts and the hearing examiner's finding to the contrary is in error (App. A, pp. 13a-14a).

Since the granting of needed assistance to petitioner's dealers by any method other than consignment[11] would necessarily have involved reducing the dealer buying price, any alternative would have completely destroyed one of the purposes of petitioner's consignment programs, *i.e.*, avoidance of price discrimination liability. Thus, the holding of the court of appeals and the commission is apparently that petitioner was required to risk liability under the Robinson-Patman Act and offer reduced buying prices as an alternative to the consignment agreement, although there was no question at the time of the legality of consignment selling. Consequently, the type of "coercion" found to exist by the commission and the court of appeals is

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[11] Petitioner was not legally required, of course, to offer its dealers assistance in any form.

unavoidably present whenever a company adopts the consignment method of distribution for the purpose of avoiding price discrimination liability in assisting its dealers to remain competitive. What the court of appeals below actually held, therefore, is that consignment selling under such circumstances is *per se* illegal. This holding, petitioner submits, is erroneous and is not in accord with *Simpson*.

B. The Holding of the Court Below on the Key Issue of Coercion Is in Conflict With the Holding of the Seventh Circuit in Sun Oil Co. v. Federal Trade Commission

In *Sun Oil Co.* v. *Federal Trade Commission,* No. 14503, 7th Cir., August 19, 1965 (App. B, *infra,* pp. 19a-42a), the court of appeals had before it a petition by Sun Oil Company to review a Federal Trade Commission order to cease and desist from horizontal and vertical price fixing by means of consignment arrangements with retail gasoline dealers. The facts there found by the commission, as distinguished from those here, were that Sun had negotiated the agreement with the dealers in group meetings rather than individually. On these facts, the Seventh Circuit held there was adequate basis for finding that Sun had acted as a conduit for dealers' *horizontal* price fixing agreements. Agreeing with the commission, the Seventh Circuit thus distinguished *General Electric* "on the ground that this price fixing was horizontal as well as vertical," and found *United States* v. *Masonite Corp.,* 316 U.S. 265 (1942), controlling (App. B, p. 34a).

While there is in this case no issue regarding horizontal price fixing, the Seventh Circuit in *Sun* was faced with facts substantially parallel to those here regarding the alleged vertical price fixing. Sun, the court of appeals found,

> . . . gave its dealers the alternative of accepting commission consignment or continuing to purchase gasoline at the established tank-wagon price (the posted price to dealers and commercial users) and posting whatever retail price they saw fit as independent dealers . . . . In other words, a Sun dealer not participating in the commission consignment arrangement not only would have to compete with the lower prices of other brands of gasoline, but also would be faced with the lower prices of Sun dealers on consignment. As Southard testified before the hearing examiner, a dealer who refused consignment might be required to sell at a loss to meet the prices of Sun's consignees (App. B, pp. 27a-28a).

No distinction exists between these facts and the "business conditions" which the court of appeals in the instant case found to constitute "coercion." However, the two courts of appeals reached directly opposite conclusions. The court below held that "coercion" within the meaning of *Simpson* existed on the basis of the facts in the instant case, although it specifically found that petitioner's "program as planned and implemented, did not entail forcing dealers . . . to execute the consignment agreement . . ." and that petitioner did not use "its position of economic power over its lessee dealers to force them into entering the contract" (App. A, pp. 13a, 14a). In contrast, the court of appeals in *Sun* found that it could not "hold the facts presented by [that] record controlled by *Simpson*" (App. B, p. 39a),[12] the holding apparently being based

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[12] Although the facts concerning the so-called "Hobson's Choice" theory of coercion in the *Sun* case are indistinguishable from the facts in the instant case, the court of appeals in *Sun* correctly believed that the type of coercion "found in [the instant case], wherein the gasoline dealer was offered the 'Hobson's Choice' of 'economic disaster or the consignment agreement'" (App. B, pp. 38a-39a), was not, as a matter of law, sufficient to render *Simpson* controlling.

upon the fact that the record in the *Sun* case, as in the instant case, gave no indication that Sun actually used coercive tactics in obtaining acceptance of its consignment contracts. In short, in obvious conflict with the court of appeals' holding below, the Seventh Circuit in *Sun* held that the type of coercion, which this Court in *Simpson* found to render unlawful a consignment program, must be more than "business conditions" which make it advantageous for dealers to enter into the consignment contract.

III. PETITIONER HAVING UTILIZED CONSIGNMENT SELLING IN RELIANCE UPON GENERAL ELECTRIC, THE COURT OF APPEALS ERRED IN REFUSING TO CONSIDER WHETHER THE EQUITIES WARRANT ONLY PROSPECTIVE APPLICATION OF ITS INTERPRETATION OF SIMPSON

In *Simpson,* this Court cautioned that there may be "equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today" (377 U.S. at 24-25). Petitioner, as both the commission and the court of appeals found, relied in good faith upon the legality of its consignment program under the long standing and then firmly established principle of *United States* v. *General Electric Co.,* 272 U.S. 476 (1926).

Before the court below, petitioner therefore argued that in equity and fairness a finding of violation should not be based upon a retroactive application of *Simpson.* The court of appeals declined to meet this issue on the basis that "the relief contemplated by this order consists of cease and desist orders which can be applied only prospectively after determination of their validity . . ." (App. A, p. 15a).

It is true, of course, that commission orders have only prospective application. This observation, how-

ever, is an evasion of the real issue—one of equity and fairness. Every court since *Simpson* which has been faced with the issue of retroactive application of that ruling has declined on equitable grounds to find liability. *Lyons* v. *Westinghouse Electric Corp.*, 235 F. Supp. 526 (S.D.N.Y. 1964); *CBS Business Equipment Corp.* v. *Underwood Corp.*, 240 F. Supp. 413, 426 (S.D.N.Y. 1964). See also *Guidry* v. *Continental Oil Co.*, No. 21543, 5th Cir., July 2, 1965, 1965 Trade Cas. ¶ 71,495.

The simple principle of fairness in declining to apply retroactively an overruling decision has been applied also in administrative proceedings involving cease and desist orders with only prospective application. See, *e.g.*, *NLRB* v. *International Brotherhood of Teamsters*, 225 F. 2d 343, 348 (8th Cir. 1965) ("we do not believe that the spirit of the Act, either administrative or general, entitles the Board, on engaging in such an about-face from its previous position and ruling, no matter in what manner or circumstances this is done, to brand a party as being guilty of an unfair labor practice" so long as the "Board's express [prior] holding . . . has remained unrenounced"). See also *Lesavoy Foundation* v. *Commissioner of Internal Revenue*, 238 F. 2d 589 (3rd Cir. 1956).

It is undisputed that petitioner utilized consignment selling in reliance upon *General Electric*. The hearing examiner held that petitioner's policy was "within the principles laid down" in *General Electric* (R. 54a). The commission found that "[d]oubtless the respondent felt that it had devised a consignment program valid in that it met all of the criteria of consignment as prescribed in the law of agency . . ." (R. 79a).

And the court of appeals adopted the commission's finding regarding petitioner's reliance (App. A, p. 9a).

It is no answer to assert that *Simpson* involved potential monetary damages in a treble damage action whereas petitioner here will be subject to injunction in the form of a cease and desist order. It cannot be gainsaid that orders of the Federal Trade Commission, which run in perpetuity and for violation of which severe penalties may be imposed, are even more serious and of greater consequence than exposure to "one shot" money judgments resulting from treble damage cases. To contend otherwise is to ignore business realities.

Notwithstanding this, the court below refused to even consider the question of retroactive application of its interpretation of *Simpson.*

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT AN OPINION AND ORDER CONCURRED IN BY ONLY TWO OF THE FIVE COMMISSION MEMBERS IS VALID AND ENFORCEABLE

The final order and opinion of the commission below was entered upon the affirmative vote of only two members of the commission (R. 83a). The fundamental question of whether less than a majority of the commission members may act on behalf of the commission in entering orders to cease and desist is thus presented. This issue is one of first impression before this Court and, insofar as can be ascertained, has never been decided by any court except the court below.

Orders of the commission being of substantial import to individual businesses and having vast potential

impact upon the nation's private economy, the issue requires resolution by this Court.[13]

The court of appeals below, in rejecting petitioner's argument on this point, stated that "[t]he rules of the Federal Trade Commission since its inception have provided for decision by the majority of panels of three members," referring to § 1.7 of the Commission's Rules of Practice and Procedure (16 C.F.R. § 1.7), and that "[w]e believe this rule is within the Commission's power to make and is wholly valid," citing *Drath* v. *Federal Trade Commission,* 239 F. 2d 452 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 917 (1957) (App. A, p. 14a). These authorities do not support the court's holding.

The *Drath* case was not concerned with the question here posed. That case involved only the question of whether the rule allowing the commission to transact business through three of its five members could properly be applied to its adjudicative functions. Three commissioners (the entire quorum and hence a majority of the commission) having agreed to issue the order, the further question of whether a simple majority of the three member quorum could validly enter an order was not raised. This being the precise issue presented in the instant case, *Drath* is not in point.

Where Congress has intended that less than the entire membership of an administrative body may participate in a decision, it has provided for such a contingency in the agency's organic act. Thus, the

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[13] The issue is currently pending before the Ninth Circuit in *Flotill Products Inc.* v. *Federal Trade Commission, appeal filed* No. 19,521, 9th Cir., September 10, 1964. It was also raised before the Fifth Circuit in *The Borden Co.* v. *Federal Trade Commission,* 339 F. 2d 953 (7th Cir. 1964), where the court, reversing the commission on other grounds, found it unnecessary to reach the question.

Federal Power Act creating the Federal Power Commission provides, similar to the Federal Trade Commission Act, that:

> No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission (16 U.S.C. § 792).

Significantly, however, the next sentence declares that "[t]hree members of the commission shall constitute a quorum for the transaction of business. . . ."

Likewise, Congress has specifically provided that the National Labor Relations Board (29 U.S.C. § 153), the Federal Communications Commission (47 U.S.C. § 154(h)), the Securities and Exchange Commission (15 U.S.C. § 78(d)(1)), and the Interstate Commerce Commission (49 U.S.C. § 17) can each act and transact business without the full membership. Such provision is not contained in the Federal Trade Commission Act and the commission thus had no authority to adopt the Rule (16 C.F.R. § 1.7) relied upon by the court below.

It is a cardinal principle of statutory construction that, where the legislature has affirmatively designated a particular right or power in one instance and omitted it in another, the intent to create such a right or power in the second instance may not be implied. See Sutherland, *Statutory Construction,* Vol. 2, Section 4915, and cases cited therein. Had Congress intended that a minority of the Federal Trade Commission should have the authority to act for the entire body, it would have specifically provided for a quorum whose decision would be equivalent to an act of the commission. Petitioner therefore submits that the order entered in this case was not entered by "the commission" and is, accordingly, not valid or enforceable.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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